

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-02-22 (C-02-334)
--	------------------------------------

**ORDER GRANTING REQUEST FOR LEAVE TO AMEND AND
DENYING REQUEST FOR RECONSIDERATION**

(Issued May 28, 2003)

On December 6, 2002, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a proceeding to impose civil penalties pursuant to Iowa Code § 476.103, asking that the Board review the proposed resolution issued in C-02-344, involving Qwest Corporation (Qwest), and consider the possibility of assessing a civil penalty pursuant to Iowa Code § 476.103(4)"a." On April 16, 2003, the Board denied Consumer Advocate's request for a proceeding to impose civil penalties, finding that in this case, the alleged slam was the result of an inadvertent error that will not be effectively deterred by civil penalties and that Iowa Code § 476.103 does not impose strict liability on telecommunications carriers.

On April 28, 2003, Consumer Advocate filed a "Motion for Reconsideration and Request for Oral Argument." In support of its motion, Consumer Advocate asserts that Iowa Code § 476.103 is a strict liability statute and the Board's finding that it is not is an error of law.

Also on April 28, 2003, Consumer Advocate filed a "Request for Leave to Amend" its original petition. Consumer Advocate proposes to amend its petition by adding reasons why the proposed resolution should be changed and providing specific reasons why penalties should be imposed.

On May 12, 2003, Qwest filed a response to Consumer Advocate's requests. Qwest states that Consumer Advocate's requests appear to provide an alternate basis for relief from the Board's April 16, 2003, order but do not provide any new information. Qwest further asserts that Consumer Advocate fails to demonstrate that the Board abused its statutory discretion by declining the imposition of civil penalties.

The Board will grant Consumer Advocate's request for leave to amend the complaint but will deny the request for reconsideration. Consumer Advocate focuses its request for reconsideration on the notion that Iowa Code § 476.103 is a strict liability statute. The Board disagrees with Consumer Advocate's analysis of this statute. Iowa Code § 476.103(4)"a" states:

. . . [A] service provider who violates a provision of this section, a rule adopted pursuant to this section, or an order lawfully issued by the board pursuant to this section, is subject to a civil penalty, which, . . . **may be levied** by the board. . . . (Emphasis added).

This statutory language clearly requires that the Board exercise its discretion when determining whether civil penalties are to be imposed. The legislature's intent to allow for Board discretion when making such a determination does not support Consumer Advocate's theory of strict liability.

Consumer Advocate points out that the Board has previously found that its slamming rules do not require any particular intent on the part of the slamming entity. See Office of Consumer Advocate v. Qwest Corp., Docket No. FCU-02-5 (C-02-22), "Order," issued May 14, 2002. This case, however, does not support Consumer Advocate's position. In Docket No. FCU-02-5, the Board determined that a pervasive pattern of slamming incidents existed, rather than one solitary incident as in this case. The presence of such a pattern raises the issue of using civil penalties to deter future slams, and in such a situation; the argument of non-intentional slams is not a satisfactory defense. As the Board indicated in its April 16, 2003, order in this docket, many slamming cases, such as this one, appear to be the result of inadvertent errors that will not effectively be deterred by civil penalties. The Board finds that civil penalties are not appropriate in this case, based on a single slamming incident, which appears to be the result of an inadvertent incident.

In its proposed amendment to its original complaint, Consumer Advocate reiterated the record already reviewed by the Board, but did so in a manner intended to satisfy the standard that the Board stated should be applied when future requests for formal proceedings are filed. The Board will grant Consumer Advocate's motion

to amend. However, as indicated in its April 16, 2003, order, the Board carefully reviewed the entire record in this proceeding, which included information assembled in the informal complaint proceedings, when making its initial determination. Therefore, the reiteration of previously reviewed facts will not merit reconsideration.

IT IS THEREFORE ORDERED:

1. The "Request for Leave to Amend" filed by the Consumer Advocate Division of the Department of Justice on April 28, 2003, is granted.
2. The "Motion for Reconsideration and Request for Oral Argument" filed by Consumer Advocate on April 28, 2003, is denied.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 28th day of May, 2003.